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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 372

STATE LODGE OF MICHIGAN, FRATERNAL ORDER OF POLICE, by its President, Henry Mida, Lodge No. 115 of the State Lodge, HOWARD HEINE and BERNARD L. DUGGAN,
Plaintiffs, Appellants and Petitioners,

vs.

CITY OF DETROIT, a Municipal Corporation, EDWARD J. JEFFRIES, Mayor of the City of Detroit, JOHN H. WITHERSPOON, Commissioner of Police of the City of Detroit, County of Wayne and State of Michigan,
Defendants, Appellees and Respondents

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I.

STATEMENT OF FACTS

Respondents have filed a brief in opposition to the issuance of a writ of certiorari, to which we wish to make reply.

We shall not burden the court with any controversy over respondent's accusation that the facts are not accurately stated in our primary brief, other than to say that we believe they are therein accurately stated, with record references.

We believe that the *essential* facts stand out clearly in the petition and brief filed, free from any controversy.

We confine ourselves in this brief to the point raised in respondent's brief as to whether or not a federal question is presented.

II.

ARGUMENT

A. A FEDERAL QUESTION IS PRESENTED

The 24 year old order of the former Police Commissioner Inches forbidding membership in F. O. P., revived by the present Commissioner after this controversy had jelled, is of course the basis of petitioners' grievance. There are two aspects to the question:

1. Are petitioners' constitutional rights invaded if the order is void?

We claim definitely that they are.

2. Are petitioners' constitutional rights invaded if the order is valid, other than being in conflict with the constitutional provisions invoked?

With equal definiteness we claim that they are.

It is perhaps unnecessary to recall to the court that we claim violation of certain constitutional rights, particularly the right of assembly, as guaranteed by the First and Fourteenth Amendments. If the record does present these questions, we take it that it needs no argument that a federal question is involved and that a writ ought to issue.

(a) It would seem to admit of no denial that petitioners' right of assembly is invaded if police officers are discharged from the police department of a municipality for violation of a void administrative order, such as the one in question which purports to prohibit membership in a fraternal order.

It was our basic contention in the court below that this order was void. Our position is outlined on pages 21-28 of

our primary brief and will not be here repeated. Upon review, the question would be whether or not the order is void, and if found to be void, the application of the constitutional provisions invoked would follow as a matter of course.

It seems to us that this presents a meritorious question. That it is a federal question, involving the right of assembly, it seems to us admits of no doubt.

Incidental to this point, and raised by respondent's brief, they still urge that the Commissioner made an investigation before he revived the old Inches order. Counsel, as heretofore, states on page 14 of his brief that such investigation was proved in testimony taken before Judge Keidan, a Judge in the trial court, on an interlocutory proceeding long prior to the trial. This testimony, however, is no part of the record—it was offered twice and rejected by the trial court twice (R. 505-6). The opinion of Judge Keidan attached to respondents' answer is a part of this, and is no part of the record now before the Court.

Lack of investigation on the part of the Commissioner before re-promulgating the Inches order, and enforcing it, has always been one of the reasons we have urged in charging that the order was unreasonable and therefore void.

Again, counsel for respondent calls attention to a former proceeding when Fraternal Order of Police was a plaintiff, but against entirely different defendants,—the Police Governing Board of the City of Lansing. The Michigan Supreme Court opinion is in *Fraternal Order of Police, et al., v. Harris, et al.,* 306 Mich. 68, 10 N. W. 2d 310, petition for certiorari denied 321 U. S. 784, 74 S. Ct. 781, 81 L. Ed. 1076.

But counsel, himself, points out (respondents' brief, page 9) that, "The Lansing case differs from the Detroit case," and points out two differences. However, the great-

est difference of all is the fact *that in this court we did not urge violation of the right of assembly as we do in the present case.*

Entirely different issues were presented, and we are therefore in nowise barred by the former case. It was a separate proceeding, between different parties, presenting different issues, and different counsel represented F. O. P. in the trial court.

We quote from the respondents' brief in that case, when application was made to this court for the issuance of a writ of certiorari, on page 2:

> "The Board has not determined that policemen may not join the Fraternal Order of Police, but that a superior officer may not join, fearing evidently that such association would hinder officers in their duties and render discipline by them ineffective or impossible. It should be borne in mind that no superior officer is here complaining nor is any person objecting that he is being denied associate or honorary membership. As the trial Court said 'None of the individuals affected is a party to the action' (R. 48.)"

Again, respondent's brief says, on page 5:

> "Petitioners claim invasion of their rights under the equal protection and due process clause of the 14th Amendment. The grounds for appeal from the trial Court to the Michigan Supreme Court did not raise these constitutional questions (R. 15). The trial Court held there was no constitutional questions involved but, 'rather the proposition here involved is solely of departmental discipline' (R. 51). The Supreme Court's opinion did not discuss the constitutional question, apparently considering it was not involved."

Then it is clear that that case did not present the right of a police officer to become a member of F. O. P., and the constitutional right of assembly was not involved. Reference to the petition and briefs in that case will so further disclose.

Consequently, we say that this present case, for the first time so far as we know, presents the distinctly federal question as to whether or not a police officer may be penalized by being deprived of his job for violating a void administrative order prohibiting him from joining an organization designed for the mutual good of law enforcement officers.

(b) But we are equally sure that a federal question is presented even if the order prohibiting membership is not void, except as it comes into collision with the constitutional provisions invoked.

We have heretofore urged that the order is void because it was made without investigating as to the real character of the F. O. P., that it was based on no factual situation, but it was contrary to existing facts, and the F. O. P. is in fact a well established fraternal organization designed for the mutual good of law enforcement officers, and helpful to police work, wherefore an order prohibiting membership therein is unreasonable.

But at this point we go a step further.

Even if the Commissioner had full power otherwise to make and enforce this order, yet it deprives petitioners of their constitutional rights of assembly, and is therefore void.

The constitutional protection envelops everyone. Police officers are not excepted. While counsel asserts that the "clear and present danger" rule does not apply, we find in his brief no convincing reason why not. To assert that

petitioner—individual petitioners at least—police officers, are a class "apart" from others, is not enough. They are not so far apart as to be removed from constitutional protection.

Had there been any showing in the record of any clear and present danger, then there might have been some force to the argument. Surely no one anywhere can be divested of his constitutional protection in the exercise of any constitutional right, unless its exercise is attendant with some danger of some kind to someone else.

III.

CONCLUSION

We feel that a federal question is clearly presented, particularly as to whether or not the petitioners' right of assembly is invaded under the First and Fourteenth Amendments.

We claim (1) the order of the Police Commissioner prohibiting membership is void, whence certainly the imposition of any penalty for its violation clearly violated the constitutional provisions invoked; and (2) even if otherwise valid, the order is void because it violates the constitutional right of assembly, because no danger "clear and present" is attendant upon the exercise of the right of assembly on the part of free police officers.

So far as we know the question has not been determined by this court. It was not an issue in *F. O. P. v. Harris,* where certiorari was denied 321 U. S. 724, 74 S. Ct. 781, 88 L. Ed. 1076, so this court's action in that case is no bar.

The bald question presented is :

> May a law enforcement officer become a member of an organization designed for the mutual good of all

law enforcement officers despite an order of his superior prohibiting him from so doing, whether or not that order is void other than being in conflict with the constitutional provisions invoked?

We claim that he may.

We ask that the writ issue as prayed.

Respectfully submitted,

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